

BEFORE THE
PHYSICAL THERAPY BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

NEAL GUY NANZETTA, P.T.
4217 Country Trails
Bonita, CA 92002

Physical Therapist License No. PT 6699

Respondent.

Case No. 1D-2002-63053

OAH Case No. L2003010470

PROPOSED DECISION

Steven V. Adler, Presiding Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on May 19, 2003, in San Diego, California.

Alvin J. Korobkin, Deputy Attorney General, Department of Justice, State of California, represented Complainant Steven K. Hartzell, Executive Officer, Physical Therapy Board of California, Department of Consumer Affairs, State of California (complainant).

Mitchell Freeman, Attorney at Law, represented respondent Neal Guy Nanzetta, who was present at the hearing.

The record was opened, evidence was taken, and the matter was submitted on May 19, 2003.

FACTUAL FINDINGS

1. Respondent Neal Guy Nanzetta (respondent) is 57 years old. On March 14, 1974, the Physical Therapy Board of California (Board) issued Physical Therapist License No. PT 6699 to respondent. The license was in full force and effect at all times relevant to this case, and will expire on May 31, 2004 unless renewed. No prior disciplinary action against respondent's license has been alleged or proven.

2. On November 12, 2002, complainant signed Accusation No. 1D-2002-63053 in his official capacity. The Accusation and other jurisdictional documents were served on Respondent. Respondent timely filed a Notice of Defense. This matter is properly before the administrative court.

Respondent's Conviction

3. On or about July 17, 2001, respondent was convicted based on his guilty plea to violation of Penal Code section 422, a felony, and his admission of the truth of a Penal Code section 12022.5(a)(1) penalty enhancement allegation. He was sentenced, and placed on probation for five years with the following terms and conditions.

- Serve a sentence of 365 days in the county jail with credit for 13 days time served; custody was stayed pending completion of 250 hours of volunteer work at a non-profit organization.
- Pay a fine of \$200.00 and a restitution fine of \$250.00.
- Not possess a firearm, ammunition, or other deadly weapon.
- Obey all laws.
- Comply with a curfew if directed by his probation officer.
- Follow such course of conduct as his probation officer dictates.
- Submit his person, property, place of residence, vehicle and personal effects to search at any time with or without a warrant and with or without reasonable cause when required by his probation officer or other law enforcement agency.
- Report to his probation officer as directed.
- Report any change of employment or address to his probation officer.
- Provide true name, address and date of birth if contacted by any law enforcement officer.
- Seek and maintain full-time employment.
- Obtain the consent of the probation officer before leaving San Diego.
- Attend and successfully complete a drug counseling program.
- Complete a program of residential treatment and aftercare if directed by the probation officer.
- Attend meetings of Narcotics Anonymous if directed by the probation officer.
- Not use or possess any controlled substance without a valid prescription.
- Submit to testing for alcohol and/or controlled substances when required by the probation officer or any law enforcement officer.
- Attend and successfully complete anger management counseling program.
- Not use force, threats or violence on another person.
- Not contact, annoy or molest the victim.

4. On April 9, 2003, respondent appeared before the Hon. Jeffrey Fraser, Judge of the Superior Court in San Diego. Respondent's conviction was set aside. Respondent was permitted to enter a new plea of not guilty, and the criminal charges were dismissed pursuant

to Penal Code sections 1203.4 and 1203.4a. Respondent was released from all penalties and disabilities resulting from his conviction.

Circumstances of the Offense

5. Reports of the California Highway Patrol were admitted into evidence (Exh. 4) to establish the facts of the offense committed by respondent.

On June 25, 2001, respondent was involved in a minor accident with another motorist. The investigating officers assigned fault in the accident to respondent. Apparently, respondent's car and the car of the other driver made minor contact, causing damage to the other driver's car. After the shock of the collision (side view mirrors made contact), respondent saw no damage and continued on his way.

However, the other driver's car had sustained damage and she attempted to have respondent pull over so that information could be exchanged. The driver of the other car was AD, an African-American woman. She followed respondent for a distance and honked at him to pull over; he did not. AD pulled her car next to respondent's at a light, and yelled to respondent to pull over. Respondent did not do so. Instead, he shouted back profanities and used a derogatory term for African Americans starting with the letter N.

Respondent continued, again with AD following in her car. She still needed to exchange information with respondent, and again pulled up next to him at another intersection. A similar exchange followed, featuring repeated profanity and racial slurs by respondent. In addition, respondent obtained a flare gun from his car and pointed it at AD's car.¹

At this point, AD gave up her attempts to speak with respondent and turned onto a side street. Respondent continued to his residence. He did not report the incident to the authorities.

Later that night, respondent heard a knock on his door, but ignored it. Solicitors often come to his door in the evening, and he does not answer the door. In addition, he was on the phone speaking with a friend. When he got off the phone, he got a call from a neighbor who told respondent that the police were outside and they wanted him to come out of his house. Respondent did so, and was arrested.

When the police searched respondent's home, they found quantities of marijuana and methamphetamine. They also found three firearms with ammunition and some illegal weapons – a baton, an ASP brand collapsible baton, and an electric stun gun. The firearms were legal weapons; the others were not.

¹ Respondent's version of the confrontations at the hearing varied from the account above. However, respondent stipulated to the truth of the allegations in the Accusation and agreed that the CHP report could be admitted into evidence (Exh. 2). To the extent that respondent's account and that in the CHP report and Accusation differ, respondent's version is rejected based upon his stipulation.

Evaluation

6. Respondent pleaded guilty to a violation of Penal Code section 422, which provides as follows in part.

Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison.

Respondent's conviction is found to be substantially related to the qualifications, functions and duties of a physical therapist within the meaning of Business and Professions Code section 2660 and Title 16, California Code of Regulations, section 1399.20.

Although the evidence clearly established that respondent possessed illegal drugs, he was charged only with having suffered conviction of a crime. Accordingly, his possession of illegal drugs and weapons, also clearly related to the qualifications, functions and duties of a physical therapist, will be considered only as a factor in aggravation of disciplinary sanction, rather than as cause for discipline.

Respondent's possession of firearms and ammunition was not shown to violate the law, and he was not convicted of any criminal offense arising out of his possession of firearms. It was established that respondent possessed firearms and ammunition for them, but said possession constitutes neither cause for discipline nor a factor in aggravation or mitigation.

Respondent's failure to stop to exchange information with another driver after an accident and his totally unacceptable behavior towards AD, including his use of insulting racial slurs will be considered as factors in aggravation.

7. Respondent introduced evidence in mitigation. After respondent's conviction, he successfully completed all terms and conditions of his probation and was released from probation about three (3) years early. His motion to withdraw his plea of guilty and for dismissal of criminal charges was granted. It is clear that his compliance with the terms and conditions of probation, and all orders of the Superior Court was exemplary. Judge Fraser, who granted respondent's motion for dismissal of the criminal charges, expressed the opinion that the incident was a once-in-a-lifetime matter for respondent, that the incident was inconsistent with respondent's character as demonstrated by successful and early completion

of all probation requirements, that respondent was an exception to the rule, and that Judge Fraser would remember the case.

It is also clear that respondent entered his guilty plea at an early stage in the proceedings. Respondent's admission of guilt was clear and unequivocal; he did not enter a no contest plea or a plea in which he did not admit guilt.

8. Respondent visited the Museum of Tolerance in Los Angeles to gain an understanding of the noxious effects of racial, ethnic or religious hatred and intolerance. He learned how racial prejudice has led to catastrophic results in man's history. His visit made him feel sorry and stupid about his conduct towards AD.

Respondent agreed that his visit to the Museum had been discussed with his attorney during his criminal proceedings. However, he credibly maintained that he had received real value from his visit.

9. Respondent also wrote a letter to AD, the victim of his verbal abuse (Exh. B). He received no reply. Although respondent admitted fault and apologized in the letter, the letter was also full of self-pity, almost portraying respondent as the victim in the incident with AD.

10. Respondent attended Narcotics Anonymous sessions as a condition of his criminal probation. Exhibit D demonstrates that respondent regularly attended these sessions commencing on December 18, 2001 and ending on March 28, 2002. Respondent also successfully completed an aftercare program at Options for Recovery at the McAlister Institute for Treatment and Education (Exh. C).

11. Respondent also successfully completed a 12-hour course on Anger Management on October 30, 2001 (Exh. E).

12. Respondent performed 130 hours of unpaid volunteer work at the South County Animal Shelter. The letter accompanying the certification commends respondent for efficiency, politeness, and willingness to do any task assigned (Exh. F). Respondent also performed 147 hours of unpaid volunteer work at the Bonita Sunnyside County Library, and was similarly commended for politeness, efficiency and hard work (Exh. G).

13. Respondent submitted a series of letters of recommendation from patients and their relatives attesting to his abilities as a physical therapist (Exh. H).

- Carolyn Bumer, an employee of the Public Defender's Office, complimented respondent for his work with Ms. Bumer's mother.
- Darlene Duncan, who also testified at the hearing, attested to respondent's professionalism, trustworthiness, reliability, courteousness and integrity.

- Mr. and Mrs. Stewart, respondent's neighbors, attested to his good qualities as a neighbor. Ms. Stewart is a former Deputy District Attorney, and she commented that respondent has shown remorse for the crime he committed.
- Keith Jackson, a Correctional Counselor for the County and former probation officer, also submitted a letter expressing surprise at the incident which resulted in respondent's conviction. Jackson, who also testified at the hearing, noted that respondent has shown remorse and has suffered heavy consequences (aside from criminal penalties) from the incident.
- Richard Blackburn commented favorably on respondent's abilities as a therapist and noted that respondent had Victoria V.E. (an African American) as a patient. Ms. V.E. complimented respondent's work.
- Delores Ware, an African American former patient, wrote a lengthy commendation of respondent's skills as a physical therapist and complimented him on his caring manner and courtesy. He suggested a "TENS" unit for Ms. Ware, and she got relief after that therapy began. Ms. Ware felt that respondent is not racially prejudiced and provides excellent care irrespective of the skin color of his patient.
- Bonnie Dolan, Executive Director of Villa Bonita, a retirement community, praised respondent for his physical therapy work for the residents of her facility.
- Lloyd Enke, President/CEO of Health Force, commended respondent based on respondent's two-year employment with Health Force. Mr. Enke praised respondent for honesty, compassion and ability as a physical therapist.
- Michael Bailey, respondent's insurance agent since 1982, commended respondent for being friendly and positive.
- William and Arlene King wrote to attest to respondent's ability in treating a family member. Respondent became a family friend while providing treatment for this patient for ten years. The King family likes and respects respondent.
- The administrator of the Sun and Sea Manor commended respondent for his work and manner based on a professional acquaintance spanning 14 years (in 2001.)
- Linda Gee, a fellow physical therapist, found respondent friendly and professional, with a good reputation among both patients and staff members.
- Tomas Shpall, an attorney who represented respondent in a workers' compensation matter, also wrote in support.
- Joyce Glaze, another of respondent's insurance agents, found respondent professional, respectful and courteous.
- Marcos Borrero, M.D. wrote to report that therapy provided by respondent to a patient had been appropriate and that respondent's manner was excellent.
- Richard Greenfield, M.D. and Raymond Vance, M.D. wrote that respondent had worked with them at the San Diego Industrial Medical Clinic. Respondent ran their in-office physical therapy unit; he did good work and was appreciated by the patients.
- Diana Rockwell is Assistant Director of Clinical Services for Tender Loving Care Staff Builders, a company providing in-home care. She supervised respondent for about a year and a half and found him to be a fine therapist who was appreciated by patients.

14. Respondent testified in his own behalf. Physical therapy is the only profession he has ever known. He is fluent in Spanish, and takes pride in his ability to treat patients from all walks of life, all ages, and every ethnic or racial group.

Respondent agreed that he had overreacted during the incident and that he should have complied with the law; he should have stopped and exchanged information with AD. Instead, he acted with poor judgment. He did not realize that AD's family was in the car with her and did not understand that his actions would terrify AD and her family.

Respondent lied to the police about having guns in his home because he was scared. He did not understand that the police needed to know about guns for their own safety. He admitted possessing the illegal weapons (baton, collapsible baton and stun gun) and said that he had no idea they were illegal. The weapons were purchased by mail order and sent to him at his home.

Respondent's wages are his only source of support, and physical therapy is the only profession he knows. If he cannot work as a physical therapist, he will be unable to make his house payments. Respondent has spent between \$12,000.00 and \$15,000.00 for attorney fees and other expenses arising out of the incident with AD.

Respondent admitted that he had possessed the marijuana and methamphetamine found by the police in his home. Respondent had used marijuana as a recreational drug for years, smoking it sometimes in the evening and on weekends. He started to use methamphetamine eight years ago when going with a woman who also used the drug. He liked to use marijuana and methamphetamine together.

He has not used any drugs since the day of his arrest, and does not miss them. He went regularly to Narcotics Anonymous meetings and was subject to random drug testing. He complied with these probation requirements without apparent difficulty, and there is no evidence that respondent has used any illegal drugs since his arrest. There is no evidence that respondent has any problems with alcohol; he uses alcohol rarely.

15. John L. Hessler, Ph.D., was respondent's therapist and saw him seven times. Respondent wanted additional therapy to that required by his probation, and came to Dr. Hessler for that reason. Dr. Hessler is a well-qualified clinician, a Navy veteran, and a respected member of his professional and his private communities as evidenced by his *curriculum vitae* (Exh. L).

Dr. Hessler read the entire police report (Exh. 4.) Dr. Hessler did not find that respondent's version of the incident was unusually self-serving. Respondent understands the gravity of the crime that he committed and respondent's expressions of remorse are genuine, in Hessler's opinion.

According to Dr. Hessler, respondent is not a danger to himself or to others. Dr. Hessler opined that respondent's incident with AD was an isolated incident. Respondent

does not present as a person with a hair-trigger temper. Dr. Hessler found that respondent does not suffer from racial prejudice or hatred, although Hessler opined that everyone has some degree of racial or ethnic prejudice that may be manifested under sufficient stress.

Dr. Hessler testified convincingly that in his opinion, respondent is no longer using illegal drugs. Respondent would follow the orders of the administrative court and the Board because respondent had complied with all orders of the Superior Court and probation officer. Dr. Hessler can state that respondent will not be a danger to his patients.

Dr. Hessler's testimony was clear and convincing. He readily admitted his areas of ignorance and deferred to the facts established by the record whenever those facts conflicted with his recollections.

16. No evidence of complainant's costs of investigation or prosecution was introduced.

LEGAL CONCLUSIONS

1. The standards for determining whether respondent is rehabilitated (for license suspensions or revocations) are set forth in Title 16, California Code of Regulations, section 1399.22.

"When considering the suspension or revocation of a license on the ground that a person holding a license under the Physical Therapy Practice Act has been convicted of a crime, the board in evaluating the rehabilitation of such person and his or her eligibility for a license shall consider the following criteria:

(a) The nature and severity of the act(s) or offense(s).

(b) The total criminal record.

(c) The time that has elapsed since commission of the act(s) or offense(s).

(d) Whether the licensee has complied with any terms of parole, probation, restitution or any other sanctions lawfully imposed against such person.

(e) If applicable, evidence of expungement proceedings pursuant to Section 1203.4 of the Penal Code.

(f) Evidence, if any, of rehabilitation submitted by the licensee."

2. The nature or severity of respondent's offense is properly characterized as moderate, when judged against the wide range of crimes. The offense was a felony and involved a threat of harm to another. There is no question that respondent terrorized a family and that such conduct is completely unacceptable. However, no injury was inflicted, no

firearm was discharged, and there was no evidence regarding property damage. The incident does appear to be isolated when viewed in the context of respondent's life history.

Respondent has no criminal record. He has never had an accident before this one and has never been arrested for any offense. The amount of time elapsed since the incident is only about two years; not much time.

However, the last three factors solidly favor respondent. He completed all probation requirements early. His motion to dismiss the criminal charges was granted. He has taken solid and convincing steps to show his rehabilitation. Based on the Board's standards, it is clear that respondent should be permitted to continue to practice physical therapy.

However, public protection requires probation be imposed for a reasonable time.

3. Complainant urges that as a condition of probation, respondent be required to participate in the Board's Diversion Program as a condition precedent to being permitted to resume the practice of physical therapy. The argument is rejected for a number of reasons.

First, respondent has already submitted to random chemical testing for illegal drugs as a condition of probation starting in August 2001. He has participated in Narcotics Anonymous for about three months, all that was apparently required by his probation officer. He successfully completed a treatment program at Options for Recovery in February 2002. He has been treated by a licensed psychologist, who has opined that respondent was not taking drugs and has successfully overcome any psychological attraction that illegal drugs held for respondent.

Second, there is no evidence regarding the diversion program's requirements. For this reason, there is no basis to conclude that the diversion program is more effective, more successful, more rigorous or affords any more public protection than the programs already successfully completed by respondent.

Third, complainant took no steps to suspend respondent's license at any time. It must be presumed that there was no concern that respondent would harm patients as a result of drug use or for any other reason. A suspension at this point is not supported by any evidence of present danger to patients arising from present illegal drug use. The apparent argument underlying the request for suspension is that not enough time has passed, or that the programs already completed by respondent were inadequate to ensure public protection. There is simply no evidence to prove these assertions.

4. Although the Accusation made appropriate allegations and prayers for costs of investigation and prosecution, no evidence to support a cost award was introduced. Accordingly, no cost award is made to complainant.

5. Cause exists under Business and Professions Code section 2660(d) and Title 16, California Code of Regulations, section 1399.20 to revoke respondent's physical therapist license for the reasons set forth above. However, application of the Board's criteria

results in the conclusion that the revocation should be stayed, and respondent should be placed on probation for a period of five (5) years.

With the exception of the probation conditions imposed in the Order below, the remaining probation conditions recommended by the Board's Disciplinary Guidelines are found not to be reasonably related to the facts of this case.

This conclusion is based on all Legal Conclusions and on Factual Findings 1 and 3-16.

ORDER

1. Respondent's license shall be revoked, with the revocation stayed for a period of five years. Respondent is placed on probation subject to the following terms and conditions.

2. Respondent's license shall be suspended for a period of thirty (30) days.

3. No cost recovery for the Board's investigative and/or prosecution cost is ordered, as no evidence of any costs incurred was presented at the hearing.

4. Respondent shall obey all federal, state and local laws, and statutes and regulations governing the practice of physical therapy in California.

5. The respondent shall be in compliance with any valid order of any court. Being found in contempt of any court may constitute a violation of probation.

6. Respondent must not violate any terms and conditions of criminal probation and be in compliance with any restitution ordered.

7. Respondent shall submit quarterly declarations under penalty of perjury on forms provided by the Board, stating whether there has been compliance with all the conditions of probation.

8. Respondent shall comply with the Board's probation monitoring program.

9. Respondent shall appear in person for interviews with the Board, or its designee, upon request at various intervals and with reasonable notice.

10. The respondent shall notify all present or future employers of the reason for and the terms and conditions of the probation by providing a copy of the accusation (statement of issues) and the decision and order (or stipulated settlement) to the employer. The respondent shall obtain written confirmation from the employer that the documents were received. If the respondent changes, or obtains additional employment, the respondent shall provide the above notification to the employer and submit written employer confirmation to

the Board within 10 days. The notification(s) shall include the name, address and phone number of the employer, and, if different, the name, address and phone number of the work location.

11. The respondent shall notify the Board, in writing, of any and all changes of name or address within ten days.

12. Respondent may only practice or perform physical therapy in a supervised structured environment. The respondent shall not work for a temporary services agency or registry.

13. Respondent may not use aliases and shall be prohibited from using any name which is not his legally recognized name or based upon a legal change of name.

14. If the respondent works less than 192 hours in a period of three months, those months shall not be counted toward satisfaction of the probationary period. The respondent shall notify the Board if they work less than 192 hours in a three-month period.

15. The period of probation shall run only during the time respondent is practicing within the jurisdiction of California. If, during probation, respondent does not practice within the state of California, respondent is required to immediately notify the probation monitor in writing of the date that respondent's practice is out of state, and the date of return, if any. Practice by the respondent in California prior to notification to the Board of the respondent's return will not be credited toward completion of probation.

16. If respondent violates probation in any respect, the Board, after giving respondent notice and the opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. If an accusation or petition to revoke probation is filed against respondent during probation, the Board shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final.

17. Following the effective date of this probation, if respondent ceases practicing physical therapy due to retirement, health or other reasons respondent may request to surrender his license to the Board. The Board reserves the right to evaluate the respondent's request and to exercise its discretion whether to grant the request, or to take any other action deemed appropriate and reasonable under the circumstances. Upon formal acceptance of the tendered license, the terms and conditions of probation shall be tolled until such time as the license is no longer renewable, the respondent makes application for the renewal of the tendered license or makes application for a new license.

18. Upon successful completion of probation, respondent's license or approval shall be fully restored.

19. Within 90 days of the effective date of this decision, respondent shall take and pass the Board's written examination on the laws and regulations governing the practice of physical therapy in California. If respondent fails to pass the examination, respondent shall

be suspended from the practice of physical therapy until a repeat examination has been successfully passed.

20. It is not contrary to the public interest for the respondent to practice physical therapy under the probationary conditions specified in the disciplinary order.

21. Respondent shall abstain completely from the personal use or possession of controlled substances as defined in the California Uniform Controlled Substances Act, dangerous drugs as defined by Section 4211 of the Business and Professions Code, or any drugs requiring a prescription. This prohibition does not apply to medications lawfully prescribed to respondent for a bona fide illness or condition by a practitioner licensed to prescribe such medications.

22. Respondent shall immediately submit to biological fluid testing, at respondent's cost, upon the request of the Board or its designee.

23. Within 15 days from the effective date of this decision, respondent shall enroll and participate in the Board's Diversion Program until the Board determines that participation in the diversion program is no longer necessary. Failure to comply with requirements of the Diversion Program, terminating the program without permission or being expelled for cause shall constitute a violation of probation by respondent.

DATED: June 4, 2003

Original signed by Steven Adler
STEVEN V. ADLER
Presiding Administrative Law Judge
Office of Administrative Hearings